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Tijelo Jacquinn a/k Kuin v Public Prosecutor

B HIGH COURT (KUCHING) — CRIMINAL APPEAL NO BKI-42–2/1 OF 2018
CHRISTOPHER CHIN JC
1 NOVEMBER 2019

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 41(1) of the Wildlife Protection Enactment 1997 punishable under s 41(4) — Appellant found guilty and sentenced to two years imprisonment and fined RM50,000, in default 12 months imprisonment — Whether failure to call agent provocateur fatal to case — Whether prima facie case proven — Whether there was error in trial judge's decision which warranted appellate intervention — Whether sentence meted out by trial judge adequate — Whether public interest required deterrent sentence — Wildlife Protection Enactment 1997 s 41(1) & (4)*

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The appellant was charged with the offence of in possession of sun bear body parts under s 41(1) of the Wildlife Protection Enactment 1997 ('the Enactment') punishable under s 41(4) of the same Enactment. The appellant was found guilty of the offence and sentenced to two years imprisonment with effect from the date of conviction and fine of RM50,000, in default 12 months imprisonment. Dissatisfied with the decision, the appellant filed the present appeal. The respondent had also filed an appeal against inadequacy of the sentence by the trial judge. The appellant submitted that the respondent failed to call the person who solicited by social media the purchase of the animal parts. The appellant argued that this was an agent provocateur who was PW1 and a senior officer with the Wildlife Department and the fact that he was not called was fatal to the case.

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Held, dismissing the appellant's appeal against conviction and sentence; and allowing the respondent's appeal against sentence:

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(1) The respondent could (and did) established a prima facie case against the appellant without having to call the so called 'agent provocateur'. Section 41(1) of the Enactment, which the appellant was charged under, only needed proof of possession of the sun bear parts without the relevant permit or authorisation from the authority concerned. It therefore followed that whether PW1 was the agent provocateur or whether he was or was not part of the raiding team was not relevant in proving the case against the appellant (see paras 30–32).

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(2) There was no manifest error in the reasoning of the learned judge. The learned judge had made certain conclusions on the finding of fact which the court were reluctant to disturb. The learned judge also had the opportunity to appraise the evidence firsthand as well as to observe and weigh the truthfulness of the witnesses before her. Her Ladyship was satisfied as to the nexus between the body parts seized to the time of their analysis and report. Based on the above findings, there was no merit in the arguments and submissions of the appellant's appeal in this case sufficient to warrant appellate intervention (see paras 36–39).

(3) The court agreed with the respondent that public interest loomed large in this case. The sun bear was classified as 'totally protected' in the legislation. The courts were bound to enforce the intention of the legislature manifested in the written law. In a sense, the legislature had through the Enactment, given rights to the defenseless sun bear. The relevant authorities and the courts were entrusted to both protect and enforce these rights for the beneficiaries being the general public. Taking the public interest to the forefront in this case as well as to set a deterrent sentence, the court varied the sentence as followed: (a) four years imprisonment with effect from the date of conviction; and (b) fine of RM50,000 in default 24 months imprisonment (see paras 42–44 & 52).

[**Bahasa Malaysia summary**

Perayu didakwa atas kesalahan memiliki bahagian badan beruang matahari di bawah s 41(1) Enakmen Pemeliharaan Hidupan Liar 1997 ('Enakmen') yang boleh dihukum di bawah s 41(4) Enakmen yang sama. Perayu didapati bersalah dan dijatuhkan hukuman penjara dua tahun berkuat kuasa dari tarikh sabit kesalahan dan denda RM50,000, jika gagal bayar, penjara 12 bulan. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Responden juga telah memfailkan rayuan terhadap hukuman yang tidak mencukupi oleh hakim bicara. Perayu berhujah bahawa responden gagal memanggil orang yang menghasut perayu melalui media sosial untuk membeli bahagian-bahagian haiwan tersebut. Perayu menyatakan bahawa individu tersebut adalah ejen provokator yang merupakan PW1 dan pegawai kanan di Jabatan Hidupan Liar dan hakikat bahawa dia tidak dipanggil adalah fatal bagi kes ini.

Diputuskan, menolak rayuan perayu terhadap sabitan dan hukuman; dan membenarkan rayuan responden terhadap hukuman:

(1) Responden boleh (dan telah) membuktikan kes prima facie terhadap perayu tanpa perlu memanggil 'ejen provokator'. Seksyen 41(1) Enakmen, di mana perayu telah didakwa di bawah peruntukan ini, hanya memerlukan bukti milikan bahagian beruang matahari tanpa permit atau izin tertentu dari pihak berkuasa. Oleh itu, sama ada PW1 adalah ejen provokator atau sama ada dia adalah sebahagian atau bukan

sebahagian daripada pasukan penyerbu tidak relevan dalam membuktikan kes terhadap perayu (lihat perenggan 30–32).

(2) Tidak ada kesalahan nyata dalam dapatan hakim yang bijaksana. Hakim yang bijaksana telah membuat kesimpulan tertentu mengenai penemuan fakta yang mahkamah tidak ingin ganggu. Hakim yang bijaksana juga berkesempatan untuk menilai keterangan secara langsung serta mengamati dan mempertimbangkan kebenaran saksi di hadapannya. Hakim bicara berpuas hati dengan nexus antara bahagian-bahagian badan yang dirampas hingga saat analisis dan laporan dibuat. Berdasarkan dapatan-dapatan di atas, tidak terdapat merit yang memadai dalam hujahan dan pengajuan rayuan perayu dalam hal ini yang mewajarkan campur tangan rayuan (lihat perenggan 36–39).

(3) Mahkamah bersetuju dengan responden bahawa kepentingan awam menjadi keutamaan dalam kes ini. Beruang matahari diklasifikasikan sebagai 'dilindungi sepenuhnya' dalam perundangan. Mahkamah harus menegakkan niat perundangan yang dinyatakan dalam undang-undang bertulis. Dalam keadaan ini, badan perundangan telah melalui Enakmen, memberikan hak kepada beruang matahari yang tidak mampu membela diri. Pihak berkuasa dan mahkamah yang berkenaan ditugaskan untuk melindungi dan menegakkan hak-hak ini untuk penerima manfaat iaitu masyarakat umum. Dengan meletakkan kepentingan umum sebagai keutamaan dalam kes ini dan juga untuk menetapkan hukuman pencegahan, mahkamah mengubah hukuman seperti berikut: (a) penjara empat tahun berkuatkuasa dari tarikh sabitan; dan (b) denda RM50,000, jika gagal bayar penjara 24 bulan (lihat perenggan 42–44 & 52).]

Cases referred to

Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Criminal Procedure Code s 283(1)(c)
Wildlife Protection Enactment 1997 s 41(1), (4), Schedule 1, Part 1, Schedules 2, 3

Jaikul Situn (MT Durasim & Co) for the appellant.
Nartiah Sambatan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Christopher Chin JC:

APPEAL

[1] This is an appeal by the accused against conviction and sentence by the prosecution against sentence.

CHARGE

[2] The charge against the accused are as below:

> Bahawa kamu pada 08.08.2016 lebih kurang jam 12.10 tengahari bertempat di letak kereta Pantai Satu, Tanjong Aru, berhampiran dengan Shangri-la Tanjong Aru Resort dalam Daerah Kota Kinabalu, di dalam negeri Sabah, telah memiliki 8 potong kaki Beruang Madu (helarctos malayanus), 8 batang gigi Beruang Madu (helarctos malayanus) dan 2 unit pundi Hempedu Bruang Madu (helarctos malayanus) iaitu suatu hasil haiwan daripada spesis haiwan yang dilindungi sepenuhnya sepertimana disenaraikan dalam jadual 1, Bahagian 1, Nombor 3 Enakmen Pemeliharaan Hidupan Liar 1997 tanpa diberi kuasa secara bertulis oleh Menteri bertindak atas nasihat Pengarah. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 41(1) Enakmen Pemeliharaan Hidupan Liar 1997 dan boleh di hukum di bawah sekysen 41(4) Enakmen yang sama.
>
> HUKUMAN: BOLEH DI KENAKAN DENDA RM50,000,00 ATAU PENJARA SELAMA 5 TAHUN ATAU KEDUA-DUANYA.

[3] The items found in the possession of the accused are *lapan potong kaki Beruang Madu* (bear paws), *lapan batang gigi beruang madu* (bear teeth) and two units *pundi hempedu beruang madu* (gallbladder) (No 3 of Part 1 of Schedule 1 — Totally Protected Animals)

ACCUSED

[4] The accused is a male, 35 years old Murut from Nabawan.

OFFENCE UNDER THE LAW

[5] In the case of an offence relating to an animal or an animal product of a species listed in Wildlife Protection Enactment 1997, Appendix I or Part I of Schedule 1, to a fine of RM50,000 or to imprisonment for five years or to both.

[6] In the case of an animal or an animal product of a species listed in Appendix II, Part I or Schedule 2 or Schedule 3, to a fine of RM30,000 or to imprisonment for three years or to both.

41 Possession of protected animals and animal products.

(1) No person shall possess any animal of a species listed in Part I of Schedule 1 or an animal product of an animal listed in Part I of Schedule 1 unless authorised in writing by the Minister acting on the advice of the Director.

(2) No person shall possess any other protected animal or animal product thereof unless such animal or animal product has been lawfully imported, obtained under the authority of a valid licence or permit, through operation of the law or in consequence of the death of any person or has been purchased in accordance with section 48(2).

(3) The burden of proving lawful possession of any animal or animal product shall be upon the person possessing such animal or animal product.

(4) A person who contravenes subsection (1) or subsection (2) commits an offence and shall be liable on conviction, be liable, in the case of an offence relating to —

(a) an animal or an animal product of a species listed in Appendix I or Part I of Schedule 1, *to a fine of not less than fifty thousand ringgit and not more than two hundred and fifty thousand ringgit and with imprisonment for a term not less than one year and not more than five years*; (Emphasis added.)

SENTENCE METED ON THE ACCUSED

[7] Sentenced passed by the trial judge was two years imprisonment with effect from the date of conviction and fine of RM50,000, in default 12 months imprisonment.

BRIEF FACTS OF THE CASE

[8] On 8 August 2016 at around 9am, PW1 who is the Pembantu Hidupan Liar Kanan received an anonymous phone call that a wildlife sale transaction will happen in Tanjung Aru. He then organised his team and went to Tanjung Aru beach and arrived there around 10.30am–10.45am.

[9] He then briefed his team. At around 12.05, during their observation, he saw the accused in a Dmax double cabin entered the parking lot where they were waiting.

[10] He then saw the accused who was the driver of the vehicle, alighted from the vehicle while talking to his phone. Not long after that, he saw the accused came back to the Dmax with another person and opened his car door.

[11] At around 12.10pm, PW1 and his team approached the accused's vehicle and saw clearly several bear feet inside the Dmax vehicle. He then showed his authority card and introduced himself and his team. They then inspected the vehicle and found eight bear feet, eight bear teeth and two bear

gallbladders. The totally protected animal products were seized and the accused was arrested. Another man who was the front passenger in the Dmax was also arrested.

ISSUES RAISED BY THE DEFENCE

[12] That the prosecution used an agent provocateur who not only provided the information but also took a very active part in enticing the accused to purchase the exhibits seized. This is based on PW1's testimony that he received information that 'ada aktiviti penjualan hasil haiwan dilindungi akan berlaku di Tanjung Aru' only but NOT the exact location in Tg Aru. PW1 and his team would not know where to set up the ambush at the place they did, nor would they know the vehicle used by the accused, if there was no agent provocateur actively involved. The person who was seen walking together with the accused before the accused opened his car door was never arrested together with the accused.

[13] The prosecution failed to call the agent provocateur.

[14] The failure of the investigation team to conduct forensic investigation on the accused's handphone to find the whatsapp messages between the accused and the agent provocateur who enticed the accused to find and sell the said sun bear products which he would buy for a very good price.

[15] That it was unreasonable for a very senior officer of Jabatan Hidupan Liar (Penolong Pengarah) who volunteered to become the raiding party's driver per se. It was also shown that this Penolong Pengarah's name was listed in the list of raiding team members (exhs P8A and P8B), which contradicted PW1's testimonies that the Penolong Pengarah did not participate in the raid (credibility of PW1).

[16] That the Penolong Pengarah being a very senior officer in the department, could have been the officer who played a very significant role with the agent provocateur or appointment of the same.

[17] There was a break in the chain of evidence relating to the sun bear products from the time they were seized from the accused until the time they were tagged and sent for analysis at Jabatan Perlindungan Hidupan Liar dan Taman Negara.

[18] The exhibits of bear feet, bear teeth and gallbladders were lumped together in three separate plastic bags (feet/teeth/gallbladders). When PW5 took a meat sample from the bear feet, he did not specify if he have taken

sample from each of the bear feet. As such, there might be other species of bear feet in the plastic bag, which is not illegal to possess.

[19] During the taking of meat samples, PW5 only explained the procedure he used while taking meat sample from the plastic bag containing the bear feet. He did not explain the procedure he used when taking samples from the plastic bags containing the teeth and gallbladder. This created doubt in the chain of evidence from the sampling until the time the samples were sent to analysis.

ISSUES RAISED BY THE PROSECUTION

[20] Sun bear (*Helarctos Malayanus*) is listed as totally protected animals in Schedule 1 of the Wildlife Conservation Enactment 1997. This is because this species is in danger of extinction. The risk of extinction of this species is accelerated with the increase of selling of this species body parts through social media due to high demand. The main purpose of this activity is for monetary gain.

[21] This is a very serious environmental offence and this case has attracted the interest of not only the public but the government as well as local and foreign environmental NGOs.

[22] This is a public interest case.

[23] The eight bear feet, eight bear teeth and two bear gallbladder were from at least two adult sun bears.

[24] In the case of SEM-62ES-7/10 of 2017, both accused were convicted and sentenced to four years imprisonment and a fine of RM150,000 each for in possession of a totally protected animal listed under Part 1, Schedule 1 of the Wildlife Conservation Enactment 1997.

GROUNDS OF THE JUDGE

[25] *On the conviction:*

(a) based on the testimonies of the accused himself, the accused himself admitted to have purchased the eight bear feet, eight bear teeth and two bear gallbladder with the intention to sell;

(b) although the accused testified that it would be an offence selling the bear body parts, ignorance of law is not a defence;

(c) the accused's 'good intention' of helping someone in need of the bear body parts be selling to them could not act as a defence in this case;

(d) possession was proven by the prosecution. The accused was caught red-handed with the sun bear body parts in his car;

(e) DNA analysis found that the body parts belonged to sun bear species. There was no break in the chain of evidence; and

(f) the accused failed to raise any reasonable doubt against the prosecution's case.

[26] *On the sentence:*

(a) public interest;

(b) seriousness of the offence; and

(c) reformation, retribution and deterrence.

ANALYSIS OF THE ACCUSED'S SUBMISSION

[27] The accused's appeal is founded on the fact that the prosecution failed to call the person who solicited by social media the purchase of the animal parts. The accused submitted that this was an agent provocateur who was PW1 and a senior officer with the Wildlife Department and the fact that he was not called was fatal to the case.

[28] The accused submitted that the court in *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 considered whether the failure to call the agent provocateur was fatal to the prosecution case wherein Mohamed Azmi SCJ at para 25 held as follows:

> ... I would like to refer to the recent decision of the Federal Court in the case of *Ghazalee Kassim & Ors v Public Prosecutor* [2009] 4 CLJ 737 wherein on this same issue Zaki Tun Azmi CJ in delivering the judgment of the court had this to say:
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> > Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer him as a witness to the defence prejudiced the appellants? On the facts of this case, has it raised any reasonable doubt as to the guilt of the appellants?

[29] It is submitted that the failure of the prosecution to call PW1 as a witness and/or offered him to the defence in cross-examination and/or rebuttal had indeed prejudiced the appellant and/or the prosecution case. It is also submitted that such a failure had raised reasonable doubt as to the guilt of the appellant as the non-calling of PW1 by the prosecution or the non-offering of PW1 to the defence had caused gaps in the prosecution case, and as such *FATAL* to the prosecution case which the honourable sessions court registrar had failed to recognise and/or apply in favour of the accused.

[30] I cannot agree with the submission of the accused. The prosecution could (and did) established a prima facie case against the accused without having to call the so called 'agent provocateur'. The manner as to how the accused came about being in possession of the animal parts for sale are not relevant for the purpose of proving the ingredients of the offence. The offence is one of possession of the prohibited animal parts.

[31] The s 41(1), which the accused was charged under, only needed proof of possession of the sun bear parts without the relevant permit or authorisation from the authority concerned.

[32] It therefore follows that whether PW1 was the agent provocateur or whether he was or was not part of the raiding team is not relevant in proving the case against the accused. Again, it is stressed, the prosecution need only proof possession as described in s 41(1) above.

[33] It is difficult to see how calling PW1 can help the accused to rebut the assumption that he was in possession of the animal parts in question unlawfully.

[34] It is also difficult to conclude any prejudice suffered by the accused if the so-called agent provocateur was not called. After all, the testimony of the accused during the trial was such that he admitted purchasing the sun bear body parts for sale.

[35] As regards the fine imposed, I am mindful of s 283(1)(c) of the Criminal Procedure Code which states:

> (c) The period for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale:
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> — where the maximum term of imprisonment exceeds two years (in this case 5 years) — the period shall not exceed half of the maximum term of imprisonment.

DECISION ON CONVICTION

[36] I can find no merit in the arguments and submissions of the accused's appeal in this case sufficient to warrant my overturning the judgement of the learned sessions court judge.

[37] Based on the wording of the offence under s 41(1) above and the charge (above) as compared with the notes of proceedings I can find no manifest error in the reasoning of the learned judge nor can I find any failure in the evidence necessary to prove the charge against the accused.

[38] There are certain conclusions made by the learned judge on a finding of fact which I am reluctant, and see no cause, to disturb. The learned judge had the opportunity to appraise the evidence firsthand as well as to observe and weigh the truthfulness of the witnesses before her.

[39] This include her being satisfied as to the nexus between the body parts seized to the time of their analysis and report.

[40] I therefore disallow the appeal of the accused against the conviction. I affirm the decision of the learned sessions court judge in convicting the accused.

DECISION ON SENTENCE

[41] I now come to the appeal by both the accused and the prosecution against the sentence.

[42] I agree with the prosecution that public interest looms large in this case, and quite rightly so.

[43] The Legislature has recognised the importance of protecting our biodiversity manifested in the various legislation protecting not just our wildlife but our flora as well. By biodiversity I mean the rich variety of flora and fauna in Sabah which represents the environment we live and work in.

[44] The sun bear is part of that delicate biodiversity and is classified as 'totally protected' in the legislation. What is seldom realised or made known to the public is that each one of the residents in Sabah is also part of that shared biodiversity.

[45] We need to educate ourselves that our personal boundaries of human activity do not end at the fence of our houses. We are living in a single village called Sabah and any act or omission by anyone in any part of Sabah affecting the environment affects all of us.

[46] The death of a single sun bear for commercial reasons irreparably erodes the one and only biodiversity that we all share. Even the discarding of a plastic bottle into the sea damages the future for you and me and for our children.

[47] The damage to our delicate biodiversity results in a damaged environment in which we are to live and bring up our young. Our mindset must change to view the slaughter of endangered wildlife for profit is not just stealing from the forest but stealing from us.

[48] Hence, when a case such as this comes before the courts, the courts are bound to enforce the intention of the legislature manifested in the written law. In a sense, the legislature has through the Wildlife Protection Enactment 1997, given rights to the defenseless sun bear. The relevant authorities and the courts are entrusted to both protect and enforce these rights for the beneficiaries being the general public.

[49] Learned counsel for the accused argued before me that it is in the culture and tradition of the accused, as a Murut, to hunt and therefore he is innocent of this crime. I cannot accept this argument. If I did, then I would have to accept the previous practice of head hunting as a complete defence to murder. Our society would then descend into bloodshed and chaos.

[50] Statistics gathered in 2010 revealed that over 40% of the traditional Chinese medicine shops in Sabah stock medicines made from the parts of the sun bear, in particular, its gallbladder (*A Review of the Sun Bear Trade in Sarawak* by Kanitha Krishnasamy and Chris R Shepherd (TRAFFIC)).

[51] The courts cannot be blind to the menace to our environment and therefore to our society posed by the trade of protected wildlife parts.

[52] Taking the public interest to the forefront in this case as well as to set a deterrent sentence I allow the appeal of the prosecution against the sentence of the learned sessions court judge which is varied as follows:

(a) from two years to four years imprisonment with effect from the date of conviction; and

(b) fine of RM50,000 in default from 12 months to 24 months imprisonment.

[53] The appeal by the accused against his sentence is disallowed.

Appellant's appeal against conviction and sentence dismissed; respondent's appeal against sentence allowed.

Reported by Dzulqarnain Ab Fatar